

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 30 June 2014

Public Authority: Nursing and Midwifery Council
Address: 23 Portland Place, London, W1B 1PZ

Decision (including any steps ordered)

1. The complainant has requested information relating to misconduct cases lodged against NHS Directors.
2. The Commissioner's decision is that the Nursing and Midwifery Council (NMC) has correctly applied section 12(1) of the FOIA. He also finds that it has complied with its obligations under section 1 and section 16 of the FOIA.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 10 December 2013, the complainant wrote to the NMC and requested information in the following terms:
 - i. *How many misconduct cases have been lodged against NHS directors in the past 10 years?*
 - ii. *How many of these cases resulted in disciplinary action being taken against the individual by the NMC?*
 - iii. *How many of these such cases resulted in a decision of "no case to answer"?*
 - iv. *How many referrals of NHS directors in the past 10 years were felt to not meet the threshold for an investigation?*

5. The NMC responded on 7 January 2014. It denied holding the requested information.
6. Following an internal review the NMC wrote to the complainant on 27 January 2014 and maintained its original position. However, in addition it stated that it was possible that job titles of registrants may be contained incidentally within fitness to practise case files. However, NMC considered that it would exceed the appropriate cost limits to provide it. Therefore it applied section 12 to the request.

Scope of the case

7. The complainant contacted the Commissioner on 11 March 2014 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if NMC complied with its obligations under section 1 of the FOIA.

Reasons for decision

9. Section 1 of FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to him.
10. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. The Commissioner must decide whether, on the balance of probabilities, the public authority holds any information which falls within the scope of the request (or was held at the time of the request).
11. The NMC advised the Commissioner that no specific searches were carried out as part of its initial response to the request. This is because it was aware that it does not hold employment details or job titles of nurses and midwives on either its registration or case management systems. The reason for this is that, as a regulator, it is only required to collect data relating to particular qualifications which are registered by nurses and midwives in order for them to be able to practise. Further it only reports on certain categories or data relating to cases, including sources of referral, dates of referral, countries of registration, and types

of allegation, which are decided on by its Council and it cannot report on employment status as it does not hold this information.

12. The NMC went on to explain that it considered the possibility of some data relating to NHS directors being held incidentally within individual case files during its internal review. It stated that it did not carry out specific searches to identify such cases. In order to do so, NMC stated it would have needed to identify all relevant referrals and the outcome of these referrals in the past 10 years from its case management system. The NMC stated it receives thousands of referrals each year.
13. It went on to explain that it would then have had to search for the relevant case folders either via the name of the nurse or midwife who was the subject of the complaint or via the unique case reference of the complaint from its records management system.
14. NMC explained it would then have had to manually open each document within each case folder to ascertain whether there was any reference to NHS directors. A majority of case folders contain large pdf files which consist of hundreds of scanned pages. Due to the volume of cases received each year and the size of each case file, NMC concluded that determining whether any information falling within the scope of the request was held, was exempt under section 12.

Section 12 cost of compliance

15. Section 12(1) of the FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit".

16. In other words, section 12 provides an exemption from a public authority's obligation to comply with a request for information where the cost of compliance is estimated to exceed the appropriate limit.
17. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 18 hours in this case.
18. In estimating whether complying with a request would exceed the appropriate limit, Regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:
 - determining whether it holds the information;

- locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
19. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
 20. A public authority does not have to make a precise calculation of the costs of complying with a request: instead only an estimate is required. However, it must be a reasonable estimate.
 21. As mentioned above, NMC explained that in order to determine whether any information within the scope of the request was held within individual case files, it would need to identify all referrals and the outcome of these referrals in the past 10 years, from its case management system.
 22. NMC went on to explain that it would then have to search for the relevant case folders either via the name of the nurse or midwife who was the subject of the complaint, or via the unique case reference of the complaint from its records management system. It would then have to manually open each document within each case folder to ascertain whether there was any reference to NHS directors.
 23. NMC estimated that identifying all referrals and the outcome of these referrals in the past 10 years from its case management system would take half a day. This would involve gathering a list of case references or registrant names from raw data on its case management system. It would entail some analysis of the data prior to the implementation of its case management system in December 2009, as this data includes migrated/legacy cases which had different type names and outcomes.
 24. In addition, NMC explained that in receipt of the list of case references or registrant names, it estimated that searching through the relevant case folders and manually opening the documents within each case folder from its records management system would take approximately 20530 hours (41060 case folders x 0.5 hours). NMC stated that this was based on statistics from its most recent Fitness to Practise Annual Report which states that 4106 new referrals were received during the financial year 2012-2013, which is typical, as 4407 were received during the financial year 2011-2012, and 4211 were received during the financial year 2010-2011. The actual cases dealt with during the financial year 2012-2013 was actually higher at 4228, because 1581 cases were closed at screening, 1270 cases were closed by the

Investigating Committee, and 1377 cases were concluded by the Conduct and Competence Committee and Health Committee.

25. However, it explained that it had taken the new referrals for 2012-2013 as an estimate, then this is a total of 41060 case folders to search for the number years requested (4106 x 10 years). It stated that it knew, from routine searching of its records management system that case files typically consist of 500 to 1000 pages, depending on the outcome of the case, as cases sent for adjudication contain large pdf copies of committee papers. It would therefore take at least 30 minutes to search through each case file to ascertain whether there is any reference to NHS directors.
26. NMC confirmed that no sampling exercise was undertaken. It considered it was clear from the volume of cases received each year and with the size of each case file, that determining whether any information falling within the scope of the request is held is exempt under section 12 of the FOIA.
27. NMC also confirmed that its estimate had been based on the quickest methods of gathering the requested information i.e. retrieving electronic data from its case management and records management systems rather than searching through paper files.
28. From the explanation provided by NMC, the Commissioner is satisfied that NMC has provided adequate explanations to demonstrate that it would exceed the appropriate limit to locate, retrieve and extract the requested information. Section 12(1) does therefore apply and NMC is not required to comply with the request.

Section 16 advice and assistance

29. Section 16(1) of the FOIA provides that a public authority is required to provide advice and assistance to any individual making an information request. In general where section 12(1) is cited, in order to comply with this duty a public authority should advise the requester as to how their request could be refined to bring it within the cost limit, albeit that the Commissioner does recognise that where a request is far in excess of the limit, it may not be practical to provide any useful advice.
30. However, NMC explained that during its internal review, it considered advising the complainant to narrow his request to a shorter time period in order to supply the information within the cost limit. NMC went on to take explain that, as it would take approximately 30 minutes per case to ascertain whether there is any reference to NHS directors within each one, it could only search approximately 36 files within the limit of 18

hours. Taking into account that it receives over 4000 referrals each year, NMC considered that this small proportion of data would not result in any meaningful information.

31. In the internal review response the NMC advised the complainant "*I also consider that there is no time period within which I could advise you to limit your request where meaningful data could be supplied. In addition it is my view that it is not reasonable to provide a proportion of the information within the 18 hours for the reasons explained above.*"
32. Given the above, and even by halving the estimated time taken to review the files, it clearly would only produce a small proportion of information. Taking into consideration the above the Commissioner is satisfied that NMC has complied with its obligations under section 16(1) of the FOIA.

Right of appeal

33. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Pamela Clements
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